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7 FINANCIAL AND REAL ESTATE SERVICES

8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11  
12 AJMAL AKBAR, an individual doing  
business as COMMUNITY ONE  
13 FINANCIAL AND REAL ESTATE  
SERVICES,

14 Plaintiff,

15 vs.

16 LEXINGTON INSURANCE  
17 COMPANY, a Delaware corporation,

18 Defendant.

Case No.: C07-04027 MCC

**AMENDED CASE MANAGEMENT  
CONFERENCE STATEMENT**

Date: December 7, 2007  
Time: 10:30 a.m.  
Judge: Honorable Maxine M. Chesney  
Courtroom: No. 7

1 On November 7, 2007, Plaintiff Ajmal Akbar, an individual doing business as  
2 Community One Financial and Real Estate Services (hereinafter "Plaintiff") filed a case  
3 management conference statement pursuant L.R. 16-9. This case was subsequently assigned to  
4 the Honorable Maxine M. Cheney. Plaintiff submits this amended statement pursuant to the  
5 Court's Case Management Conference Order on November 15, 2007.

6 In an effort to minimize legal fees and costs to Defendant Lexington Insurance Company  
7 (hereinafter "Insurer"), Plaintiff and the Insurer's in-house legal counsel have engaged in  
8 negotiations in an effort to settle their disputes before Plaintiff served his summons and  
9 complaint. Insurer has not yet appeared in this case; therefore, Plaintiff must file a separate case  
10 management conference statement.

11 1. Jurisdiction and Service.

12 a. The basis for subject matter jurisdiction over Plaintiff's claims is diversity  
13 of citizenship among the parties. Plaintiff's principal place of business is  
14 Fremont, California. Defendant Insurer is a Delaware corporation with its  
15 principal place of business in Boston, Massachusetts. Defendant is an insurer that  
16 regularly issues and delivers liability insurance policies to residents of the  
17 Northern District of California; thus, this Court has personal jurisdiction over the  
18 defendant.

19 b. To facilitate settlement discussions that began shortly after Plaintiff's  
20 complaint was filed, Plaintiff has agreed to hold off service of summons and  
21 complaint upon the Insurer. As of October 30, 2007, Plaintiff has submitted  
22 supporting documentation and detailed calculations of out-of-pocket expenses and  
23 is waiting for Insurer's counter-offer to Plaintiff's settlement demand. Plaintiff's  
24 counsel left voice mails and sent emails to Insurer following up on the counter-  
25 offer but has not yet received a response. Plaintiff has also requested Insurer to  
26 waive service of process pursuant to Rule 4(d) of the Federal Rules of Civil  
27 Procedure. If Plaintiff does not receive waiver of service from Insurer by the end  
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1 of today, Plaintiff will serve the summons and complaint on Insurer on or before  
2 December 4, 2007.

3 2. Facts:

4 c. This is an action by Plaintiff against Insurer for the breach of an insurance  
5 contract and for breach of the implied covenant of good faith and fair dealing that  
6 Insurer owes to Plaintiff. Plaintiff is a real estate and mortgage loan broker  
7 licensed by the California Department of Real Estate. On or about September 7,  
8 2005, Plaintiff obtained a Miscellaneous Professional Liability Insurance Policy  
9 from Insurer (the "Policy"), the terms of which Insurer agreed to defend and  
10 indemnify Plaintiff against liability resulting from Plaintiff's real estate and  
11 mortgage loan brokerage business. The Policy is a "Claims Made and Reported  
12 Policy" that was valid for claims made beginning on September 7, 2005 and  
13 ending on September 7, 2006. The Policy applied to error or omissions occurring  
14 on or after September 7, 2004.

15 d. Plaintiff brokered a mortgage refinancing loan transaction for Maricela  
16 Gutierrez. The loan, which closed on July 8, 2005, was funded by another party,  
17 Ownit Mortgage Solutions, Inc. (the "Lender"). The rescission disclosure given  
18 to Ms. Gutierrez at the closing required that notice of a borrower's intent to  
19 rescind the loan must be made directly to Lender not the broker. Ms. Gutierrez  
20 did not give the Lender notice of her intent to rescind the loan. Instead, she  
21 visited Plaintiff on July 18, 2007 requesting that he rescind the loan transaction.  
22 Plaintiff was unable to do so because the rescission period had passed and Lender,  
23 not Plaintiff, is the only party that can rescind the loan. Ms. Gutierrez made  
24 additional visits to Plaintiff complaining about the loan transaction, including a  
25 pre-payment penalty she was required to pay. As a gesture of goodwill, Plaintiff  
26 offered to reimburse Ms. Gutierrez for the amount of her pre-payment penalty, but  
27 she never responded to this offer. Nearly one year later, Ms. Gutierrez  
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1 commenced an action against Plaintiff and Lender in the Superior Court of  
2 California, County of Alameda, entitled *Gutierrez v. Akbar et al.* (Case No.  
3 RG06276752) for damages allegedly suffered as a result of the mortgage loan  
4 transaction brokered by Plaintiff. On August 8, 2006, Plaintiff was served with  
5 Ms. Gutierrez's complaint, and he immediately gave Insurer notice of Ms.  
6 Gutierrez's lawsuit. On or around August 16, 2006, Insurer acknowledged receipt  
7 of Plaintiff's notice of the Gutierrez lawsuit and advised Plaintiff that it would  
8 notify him shortly about its decision on whether it was going to defend and  
9 indemnify Plaintiff for this lawsuit.

10 e. As of November 2006, Plaintiff did not receive any correspondence from  
11 Insurer denying or confirming coverage, so Plaintiff retained his own attorneys to  
12 defend him in the Gutierrez lawsuit. Plaintiff's defense counsel made numerous  
13 attempts to obtain coverage confirmation from the Insurer, including voice mails  
14 that were not returned and several letters advising Insurer of the case status and  
15 demanding a coverage decision. On April 30, 2007, Plaintiff's counsel sent  
16 Insurer written notice of Plaintiff's intent to file an action against Insurer for  
17 breach of the insurance contract and for "bad faith." In response, the Insurer  
18 faxed to Plaintiff's counsel on May 1, 2007 a letter purportedly dated September  
19 18, 2005 from Insurer confirming denial of coverage for the Gutierrez matter. To  
20 support its denial, Insurer argued that Gutierrez reported her claim on or around  
21 July 2005, which is before the Policy was in effect. Plaintiff never received  
22 Insurer's September 18, 2005 letter and was not provided proof of its delivery on  
23 the purported date by Insurer. On May 7, 2007, Plaintiff's counsel wrote a  
24 detailed letter analyzing California case law on the definition of "claim,"  
25 enclosing excerpts from Ms. Gutierrez's deposition transcripts regarding the  
26 details of her complaints to Plaintiff, and requesting Insurer to reconsider its  
27 denial of coverage. Insurer never responded to this request for reconsideration.

1 f. After numerous rounds of written discovery and seven depositions, the  
2 Gutierrez lawsuit was settled in mediation on June 13, 2007. Pursuant to the  
3 terms of the settlement, Plaintiff paid Ms. Gutierrez \$50,000 and her lawsuit was  
4 dismissed with prejudice. In addition to the settlement payment, Plaintiff incurred  
5 out-of-pocket legal fees and costs in excess of \$100,000 to defend himself in the  
6 Gutierrez lawsuit.

7 g. The principal factual disputes between Plaintiff and Insurer are: (1)  
8 whether Ms. Gutierrez presented a “claim” on July 2005 (shortly after the loan  
9 transaction closed) or on August 16, 2006 (when Ms. Gutierrez served Plaintiff  
10 with her complaint); and (2) whether Insurer’s actions breach the implied  
11 covenant of good faith and fair dealing.

12 3. Legal Issues: The principal disputed point of law is the meaning of the term  
13 “claim” in the Policy.

14 a. The Policy states that: “**Claim** means a notice received by an **Insured**  
15 from a person or entity advising that it is the intention of that person or entity to  
16 hold the **Insured** liable for **Damages** for a **Wrongful Act** covered under this  
17 policy.” Further, the Policy states that “**Damages** mean judgments [excluding  
18 fines, taxes, penalties, and punitive or exemplary damages] or settlements  
19 negotiated with the approval of [Insurer].”

20 b. A court’s interpretation of an insurance policy “is governed by the clear  
21 and explicit meaning of the policy’s written provisions.” *Lenscrafters, Inc. v.*  
22 *Liberty Mutual Fire Insurance Co.* (N.D.Cal. 2005) 2005 WL 146896, \*4. “If  
23 contractual language is clear and explicit, it governs.” *Id.* at \*7 (citing *Bank of the*  
24 *West v. Superior Court* (1992) 2 Cal.4<sup>th</sup> 1254, 1264-1265).

25 c. Here, Insurer defines the term “claim” broadly to include Ms. Gutierrez’s  
26 request to Plaintiff to rescind the loan transaction on July 18, 2005. Plaintiff  
27 disagrees because Ms. Gutierrez did not give him notice of her intention to hold  
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1 Plaintiff liable for damages until she served Plaintiff with her lawsuit on August  
2 8, 2006.

3 4. Motions: None pending at this time.

4 5. Amendment of Pleadings: None pending at this time.

5 6. Evidence Preservation: Plaintiff's counsel of record has in its possession  
6 evidence relevant to the issues reasonably evident in this action, including email and voice mail  
7 communications.

8 7. Disclosures: Since Insurer has not yet been served with the summons and  
9 complaint, initial disclosures have not yet been made.

10 8. Discovery: None pending at this time.

11 9. Class Actions: Not applicable.

12 10. Related Cases: The case giving rise to Plaintiff's complaint, *Gutierrez v. Akbar et*  
13 *al.* (Alameda County Superior Court Case No. RG06276752) has been settled and dismissed  
14 with prejudice.

15 11. Relief: Plaintiff seeks from Insurer reimbursement of all legal fees and costs  
16 incurred in the defense of the Gutierrez lawsuit, indemnification for the settlement payment of  
17 \$50,000 made to Ms. Gutierrez, attorneys fees and costs incurred in this action, general damages,  
18 punitive damages, and other potential relief listed in his complaint.

19 12. Settlement and ADR: Shortly after Plaintiff filed his complaint, he and Insurer  
20 agreed to negotiate a settlement before Plaintiff served his complaint. Plaintiff has sent a formal  
21 settlement offer to Insurer. Insurer subsequently requested detailed documentation from Plaintiff  
22 to support his compensatory damage claims. As of October 30, 2007, Plaintiff provided Insurer  
23 with all the documentation requested by Insurer. Plaintiff has not yet received a response or  
24 counter-offer of settlement from Insurer. Plaintiff has followed up with Insurer and requested it  
25 waive service of process. If the parties are unable to settle this matter shortly, Plaintiff believes  
26 that negotiations will likely be resolved through court-sponsored mediation.

27 13. Consent to Magistrate Judge For All Purposes: Plaintiff requested reassignment  
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1 of this action to a United States District Judge, and the action was reassigned to the Honorable  
2 Maxine M. Chesney on November 8, 2007.

3 14. Other References: As mentioned in paragraph 12 above, Plaintiff believes this  
4 case is suitable for mediation.

5 15. Narrowing of Issues: Plaintiff will discuss narrowing of issues with Insurer if this  
6 matter is not settled before the due date to serve the summons and complaint.

7 16. Expedited Schedule: Not applicable.

8 17. Scheduling: Plaintiff will work with Insurer to propose discovery and trial  
9 scheduling dates once Insurer has appeared in this action.

10 18. Trial: Plaintiff requests a jury trial and expects the trial length to be 5 to 7 days.

11 19. Disclosure of Non-party Interested Entities or Persons: Plaintiff has filed the  
12 certification required by Civil L.R. 3-16 disclosing the following non-parties: (1) Community  
13 One Financial & Real Estate Services Corp; and (2) Yama Marifat.

14  
15  
16 Date: November 30, 2007

Respectfully Submitted,

RANDICK O'DEA & TOOLIATOS, LLP



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19 By: \_\_\_\_\_  
Patrick E. Guevara

20 Attorneys for Plaintiff AJMAL AKBAR dba  
21 COMMUNITY ONE FINANCIAL AND REAL  
22 ESTATE SERVICES  
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